IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 1085 OF 2004

Sahebrao Ganpat Zende & others. ... Appellants.

Versus.

Dinkar Ananta Zende. ... Respondent.

Shri Nitin Apte with Ms.Veena Rahirkar for the Appellants.

Shri V.S.Gokhale or the Respondent.

CORAM : ABHAY S. OKA, J.

DATED : 17th February, 2005.

P.C.:

1. Heard the learned Counsel appearing for the parties.

2. The learned Counsel appearing for the Appellants/Defendants submited that Gat No.2665 never belonged to the father of the Respondent/Org.Plaintiff. He submitted that though the extract of consolidation scheme at Exh.91 shows that survey No.290 Hissa No.1(C) corresponds to Gat No.2665 and that the suit property was owned by the father of the Respondent, the said entry is as a result of a fraud and if the revenue record is read it will be very clear that the Respondent is not entitled to claim any right, title and interest in respect of the land bearing Gat No.2665.

3. A perusal of the written statement of the Appellants/Defendants shows that the only stand taken

was that Gat No.2665 was allotted to the Appellant No.1/ Defendant No.1 in family arrangement. The learned Counsel appearing for the Appellants submitted that the Respondent has tried to mislead the Court by giving improper description of the suit property in paragraph 1(a) of the plaint. I find from the written statement that there is no dispute raised about the description of the property given by the Plaintiff in the plaint. In so far as the submissions of the learned Counsel appearing for the Appellantd on the basis of the fraud are concerned, it is not in dispute that existence of fraud is not pleaded by the Appellants. Moreover the Appellants have not stepped into the witness box.

4. The learned Counsel for the Appellants stated that the lawyer appearing for the Appellants in the Courts below has not gone through the documents and though the Appellants were desirous of stepping into the witness box, the lawyer did not permit them to do so. It is pertinent to note here that no such case was made out in the lower Appellate Court. At no stage of the proceedings any application is made for amendment of the written statement. In the Appellate Court also no application for amendment of the written statement was made. Moreover no prayer for remand was made before the lower Appellate court to enable the Appellants to lead evidence. Therefore, the submissions which are sought to be made by the learned Counsel appearing for the

Appellants on factual aspect cannot be considered for the first time in the Second Appeal.

4. There are concurrent findings of facts recorded by the Courts below. The Courts below accepted the title of the Respondent/Plaintiff on the basis of the oral and documentary evidence on record. The only case made out by the Appellants in the written statement that the suit property was allotted to the Appellant No.1 in the family arrangement was not substantiated by the Appellants by leading oral and documentary evidence. They did not step in to the witness box. In this view of the matter the suit filed by the Respondent has been decreed.

5. No substantial question of law arises. The Second Appeal is dismissed with no order as to costs.

Judge.